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Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

No. 96-743

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

EMC CORPORATION,

Petitioner,

v.

NORAND CORPORATION

Respondent.

On Petition for A
Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Gael Mahony
(Of Counsel)
Timothy J. Dacey
Hill & Barlow
One International Place
Boston, Massachusetts 02110

William M. Wesley
(Counsel of Record)
Lawrence M. Jarvis
Christopher C. Winslade
McAndrews, Held & Malloy, Ltd.
500 W. Madison, 34th Floor
Chicago, IL 60661

Attorneys for Respondent

December, 1996

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.5, Respondent, Norand Corporation ("Norand"), objects to and opposes the MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE. The New England Legal Foundation ("NELF") did not attempt to contact Norand or its counsel of record to obtain consent prior to late morning on Friday, December 13, 1996, the day Norand's Brief in Opposition to Petition For A Writ of Certiorari, and consequently NELF's Motion for Leave and Amicus Brief, were due. Norand's return phone call later that afternoon to the number left by NELF in a message to Norand's counsel of record went unanswered. NELF's single eleventh hour attempt to contact Norand's counsel of record did not give Norand an adequate opportunity to consent or withhold the same to NELF's filing. Based on the information now available to Norand, however, Norand would have withheld consent if given the opportunity by NELF, and now objects to NELF's Motion for the following reasons.

NELF Misrepresented the Nature
Of Its Interest in This Case

NELF alleges in the "INTEREST OF AMICUS" that it is a "non-profit, public interest law firm," having more than 130 members including mostly corporations. Amicus Br. 1. NELF also alleges therein that "NELF and its members are concerned about the potential impact of the lower court's decision in this case on the content and uniformity of federal declaratory judgment law...." *Id.* However, NELF does not identify who its members are or who, as a law firm, it is representing, or how it became aware of this case.

When Norand's counsel of record addressed NELF's omissions with Stephen S. Ostrach, NELF's identified counsel of record, in a phone call on Tuesday, December 17, 1996, Mr. Ostrach admitted that (1) Petitioner, EMC Corporation ("EMC"), is a member and financial contributor to

NELF; (2) EMC's General Counsel, Paul Dacier, who coincidentally is listed as "Of Counsel" to EMC's Petition For A Writ of Certiorari, is an active participant in NELF and is a member of NELF's Massachusetts Advisory Counsel; and (3) the omission of disclosure of EMC's and Mr. Dacier's interest in NELF in the statement of "INTEREST OF AMICUS" was intentional. Mr. Ostrach also, not surprisingly, refused to disclose how NELF became aware of this case.

Norand believes that NELF's intentional omission of this highly relevant information from its statement of "INTEREST OF AMICUS" is misleading and fatal. NELF'S Motion should be denied.

NELF Has Demonstrated No Cognizable Interest In The Outcome of This Case

NELF's self-serving statements that it represents the "public" or the "business community" are not sufficient to overcome its intentional omission of relevant information or establish a cognizable interest in the outcome of this case, and are in fact false. First, Norand is a member of the business community, and NELF obviously does not represent Norand's interests.

Second, the present case came before the Federal Circuit under an abuse of discretion standard and on a specific set of facts arising from lengthy negotiations between two corporations. The Federal Circuit's decision merely concludes that, in view of the discretionary nature of the Declaratory Judgment Act and based on this unique set of facts, it was not an abuse of discretion for the district court to dismiss the present action. Despite NELF's doomsday scenario, the Federal Circuit's decision does not give "lower courts virtual *carte blanche* to refuse to hear declaratory actions." Amicus Br. 4. In fact, in *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995), this Court expressly rejected the argument that review under an abuse of discretion standard is tantamount to no review at all:

> we reject [Petitioner's] suggestion... that review for abuse of discretion "is tantamount to no review" at all.

Id. at 2144.

The decision below, therefore, primarily affects the relationship of the parties to this action, not the business community or public at large. NELF's Motion should be denied.

NELF's Arguments Are Overreaching
and Will Not Aid This Court

NELF argues, in a nutshell, that judge's are temperamental and have "individual biases and interests toward or against certain types of cases" (Amicus Br. 5), and thus should not have discretion in cases such as this because they are pre-disposed to abuse it. NELF also argues that the decision below "dramatically undercut[s] the fundamental strength of the federal judicial system - that each litigant has the right to a fair and just resolution of his/her claims before an impartial judge." Amicus Br. 5 (emphasis added).

These arguments, however, are addressed to the wrong forum. Congress conferred discretion on courts to not hear declaratory judgment cases rather than an absolute right upon litigants when it enacted the Declaratory Judgment Act. *28 U.S.C. §2201.* This Court has recognized this congressional grant of discretion repeatedly, most recently in *Wilton*:

> We have repeatedly characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant"
>
> * * *
>
> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the court's quiver; it created an opportunity, rather than a duty to grant a new form of relief to qualifying litigants.

Wilton, 115 S.Ct. at 2143 (citations omitted).

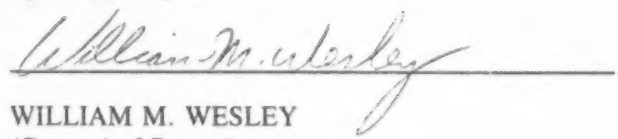
NELF'S unsupported assertions about the idiosyncracies of district court judges and alleged

absolute "rights" of litigants will do nothing to aid this Court in deciding whether to hear EMC's Petition For A Writ of Certiorari.

Conclusion

Based on the foregoing, Norand respectfully requests that the MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE be denied.

Respectfully submitted,
NORAND CORPORATION
By its attorneys.



WILLIAM M. WESLEY
(Counsel of Record)
Lawrence M. Jarvis
Christopher C. Winslade
McAndrews, Held & Malloy, Ltd.
500 W. Madison Street, 34th Floor
Chicago, Illinois 60661

DATED: Chicago, Illinois: December 18, 1996

GEORGE P. McANDREWS
JOHN J. HELD
TIMOTHY J. MALLOY
WILLIAM M. WESLEY
LAWRENCE M. JARVIS
GREGORY J. VOGLER
JEAN DUDEK KUELPER
HERBERT D. HART III
ROBERT W. FIESELER
D. DAVID HILL
THOMAS J. WIMBISCUS
STEVEN J. HAMPTON
PRISCILLA F. GALLAGHER
STEPHEN F. SHERRY
PATRICK J. ARNOLD JR.
ROBERT B. POLIT
GEORGE F. WHEELER
JANET M. McNICHOLAS
RONALD E. LARSON

LAW OFFICES

McANDREWS, HELD & MALLOY, LTD.

NORTHWESTERN ATRIUM CENTER
34TH FLOOR
500 WEST MADISON STREET
CHICAGO, ILLINOIS 60661
TELEPHONE: (312) 707-8889
FACSIMILE: (312) 707-9155

CHRISTOPHER C. WINSLADE
EDWARD A. MAS II
GREGORY C. SCHODDE
PHYLLIS TURNER BRIM
SHARON A. HWANG
DAVID D. HEADRICK
DEAN D. SMALL
KIRK A. VANDER LEEST
RICHARD T. McCAULLEY, JR.
ROBERT P. RENKE
MELISSA M. McCAULLEY
ANTHONY E. DOWELL
PETER J. McANDREWS
MATTHEW G. McANDREWS
LELAND G. HANSEN
JAMES M. HAFERTEPE
MICHAEL B. HARLIN
WILLIAM E. VAUGHAN
DANIEL L. POLLMANN
JONATHAN R. SICK
ERICA S. SCHWARTZ
MARIO F. GRECO
GEOFFREY A. BAKER

OF COUNSEL
ROBERT C. RYAN
G. JACK SAUER
DONALD P. REYNOLDS

December 18, 1996

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Re: EMC Corporation
v.
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Case No. 96-743

Dear Sir:

Enclosed please find for filing 40 copies of the Objection to Motion for Leave to File Brief of Amicus Curiae.

Very truly yours,

Christopher C. Winslade

CCW:de
Enclosures

cc: Stephen S. Ostrach
Theodore B. Olson